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Nos. 05-1645 & 06-11

In the
Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,
Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,
Respondents

KAREN LECLERC, ET AL.,
Petitioners,

v.

DANIEL E. WEBB, ET AL.,
Respondents

On Petitions for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR THE COALITION OF SERVICE INDUSTRIES, INC., IN SUPPORT OF PETITIONERS

Donald L. Morgan
Counsel of Record
642 Mapleton Avenue
Boulder, CO 80304
(303) 443-6661

August 2006

Motion for Leave To File a Brief *Amicus Curiae*

The Coalition of Service Industries, Inc. ("the Coalition"), hereby moves for leave to file the attached brief *amicus curiae* ("the Brief") in support of Petitioners.

Counsel for Petitioners have consented in writing to the filing of the Brief. Counsel for Respondents have refused consent, stating that an *amicus* brief is in their view not proper unless and until the Court issues a writ of certiorari.

The Brief addresses only the importance of the Questions Presented, not the merits. Therefore it is only in the present procedural posture of the case that it could be helpful.

As shown in the Brief's discussion of *The Interest of the Amicus Curiae*, the Coalition is uniquely and well qualified to address the adverse impact of the decision below on pending and planned U.S. treaty negotiations to obtain more liberal rules for American lawyers and law firms to provide U.S. legal services abroad. The Louisiana rule at issue discriminates against foreigners on the basis of nationality. Experience in prior treaty negotiations demonstrates that other nations will contend that such denial of "National Treatment" to them is good reason to reject U.S. requests for more liberal rules for Americans, in the legal services and quite possibly additional sectors. Liberalization of those rules is of material value to the U.S.

Respectfully submitted,

Donald L. Morgan
Counsel of Record
642 Mapleton Avenue
Boulder, CO 80304
(303) 443-6661

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Brief Amicus Curiae of the Coalition of Service Industries, Inc.

I. THE INTEREST OF THE AMICUS CURIAE

The Coalition is an incorporated non-profit membership association organized under and existing pursuant to the laws of the District of Columbia.[1] It is an advocacy organization dedicated to the reduction of barriers to U.S. services exports including legal services, and to the development of constructive domestic U.S. policies to enhance the global competitiveness of its members. Since its formation in 1982 the Coalition has worked with and offered advice on trade issues to U.S. government agencies such as the Office of the United States Trade Representative ("USTR") and the Departments of Commerce and Treasury.[2]

Robert Vastine, President of the Coalition since 1996, previously served in various Congressional staff posts and as Deputy Assistant Secretary of the Treasury for International Trade and Raw Materials Policy. He has authored many publications on U.S. trade policy. He chairs the official Industry Trade Advisory Committee for International Trade in Services and chaired its pre-2004 predecessor, Industry Sector Advisory Committee 13. Representatives of Coalition members, including members

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[1] No counsel for a Party authored any part of this Brief. No person other than the Coalition, its members or counsel made a monetary contribution to its preparation or submission.

[2] A chronology of CSI interaction with government agencies from April 2003 into 2006 appears at Services Drive Growth, Recent CSI Events, http://www.uscsi.org/meetings/.

of its Legal Services Committee, also have experience on these advisory committees. At almost monthly meetings the committees receive briefings from USTR and other agencies respecting progress and foreign objections in their negotiations and provide recommendations to them on how to meet the objections and on affirmative industry goals.

With the Department of Commerce, the Coalition has co-sponsored annual symposia on the progress and goals of the negotiations.[3] It cooperates with like-minded private sector organizations such as the European Services Forum and the Australian, Brazilian, Canadian, Chilean, Hong Kong and Japanese services organizations.

The Coalition and its members thus have a unique basis within the private sector to address the importance of the Questions Presented. The Coalition is concerned that other nations will view the Louisiana rule denying access to its bar examination and practice of law to a sub-classification of legally admitted aliens as a significant obstacle to U.S. efforts to negotiate more liberal rules for trade in legal and possibly other services in ongoing U.S. negotiations in the World Trade Organization and in other multilateral and bilateral negotiations.

II. SUMMARY OF ARGUMENT

The Louisiana rule at issue here discriminates on the basis of nationality against foreigners legally resident in this

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[3] For example, the January 12, 2005, symposium, held in the Main Auditorium at Commerce, was entitled "Services Liberalization in the Doha Round: US Industry Priorities", http://www.uscsi.org/meetings/.

country.[4] Americans can practice law in the state, the foreign Petitioners cannot. The rule runs counter to the growing trend in international relations not to discriminate on the basis of nationality. The Congress, the Administration, and United States trade representatives support that trend, convinced that our country will benefit from it.

The U.S. has for example asked many other nations not to discriminate against American lawyers who provide or wish to provide legal services in foreign countries. Because reciprocity plays a large role in trade negotiations, a foreign backlash against the already well-known Louisiana rule, if it be allowed to stand, could adversely affect our legal community in the several important trade negotiations that are currently underway or planned.

While the backlash would focus on legal services, it could prejudice our negotiations in other sectors as well. In any event, the direct monetary value of American legal services provided abroad is itself substantial. Moreover, of even greater value are the investments and commercial transactions that American businesses are likely to make abroad if they can obtain assistance from American lawyers and law firms whom they know and trust.

Expansion of our foreign trade is of large national importance. As the Associated Press reported on July 11,

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[4] "National Treatment" means that each WTO Member "shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers." General Agreement on Trade in Services, Article XVII, http://www.wto.int/english/docs_e/legal_e/26-ats_01_e.htm.

2006, newly appointed Secretary of the Treasury Henry Paulson pledged "to make sure the country does not retreat from the global economy", remarking that "the strength of the U.S. economy is linked to the strength of the global economy." He cautioned that "If we retreat from the global stage, the void is likely to be filled by those who do not share our commitment to economic reform." He added that he planned to expand trade and investment.

Few aspects of present day American legal services to foreign nations are protected by treaty, and they are vulnerable to domestic protectionist elements that would surely try to exploit the discrimination inherent in the Louisiana rule. Some nations already affirmatively prohibit or substantially constrain the provision of American legal services. The ongoing treaty negotiations could, if successful, gain treaty protection for existing practices and open up markets that are closed.

There thus is an important national interest at stake in whether the Louisiana rule will be allowed to stand. That interest argues strongly for review by this Court.

III. ARGUMENT

A. Delivery of American Legal Services Abroad Is of Substantial Value to the Nation's Legal Community and Economy

The value of cross-border exports of U.S. legal services has increased for many years and stood at $3.9 billion for 2004, while cross-border imports declined to $754 million. For 2003, the latest year for which relevant data are available, the value of legal services provided to foreigners by U.S.

law firm offices abroad was $1.1 billion.[5] Today at least 107 U.S.-based law firms have an aggregate of at least 460 foreign offices.[6] The United States, and U.S. law firms, thus have a substantial monetary interest in exports of legal services.

The experience of the Coalition and its members indicates that many of the consumers of such services are U.S. entities doing business abroad. They generally prefer to receive legal assistance from firms with which they are familiar, firms that are knowledgeable about U.S.-law aspects of what they are doing and what they are constrained from doing.[7] Thus U.S. based law firms substantially facilitate the making of foreign investments and the conduct of business abroad, as well as compliance with applicable constraints imposed by U.S. law. In view of the magnitude of foreign investments and transactions for which U.S. lawyers and firms provide legal services, the

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[5] United States Department of Commerce, Bureau of Economic Analysis, October 2005 Survey of Current Business, U.S. International Services; Cross-Border Trade in 2004 and Sales Through Affiliates in 2003, at 25, 28, 30, 40, 45-46,75, http://bea.gov/bea/pub/1005cont.htm

[6] These figures are based on a review of Martindale-Hubbell Law Directory 2006 listings for San Diego, San Francisco, and Los Angeles, California, New York, New York, and Washington, D.C. Though incomplete, the figures probably suggest the magnitude of U.S. law firms' current and potential future foreign operations.

[7] *See, e.g.*, Collective Request-Legal Services, March 2006, 1. Introduction, http://www.uscsi.org/wto/crequests.htm ("In addition to contributing to a business-friendly environment for investment, greater foreign investment is encouraged if host-country regulatory systems permit investors to have access to their own legal advisers.").

importance of exports of legal services to the U.S. economy is far greater than the dollar value of those services themselves, although harder to quantify.

B. Delivery of American Legal Services Abroad Is an Important Issue in Pending Treaty Negotiations

USTR has recognized the importance of exporting legal services in its trade negotiations for many years. The starting point for such negotiations is the fact that American lawyers and law firms enjoy few treaty rights to establish offices and to practice U.S. or local domestic law abroad. It was not until the Uruguay Round Agreements of 1994 that services were addressed in negotiations conducted under the auspices of the General Agreement on Tariffs and Trade, established in 1947. The Uruguay Round Agreements include the General Agreement on Trade in Services ("GATS") and established the World Trade Organization ("WTO") as the institutional successor to GATT.

In recognition that it had achieved very limited liberalization in services, GATS called for the reopening of services negotiations beginning in 2000. The Office of the United States Trade Representative ("USTR") began public preparations for renewed negotiations with a Federal Register notice and request for comments on objectives on March 28 of that year.[8] Those negotiations are ongoing

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[8] *See*, Trade Policy Staff Committee, Public Comments for Mandated Multilateral Trade Negotiations on Agriculture and Services in the World Trade Organization (WTO) and Priorities for Future Market Access Negotiations on Non-Agricultural Goods, Notice and Request for Comments, 65 F.R. 16450 (2000).

today, as part of what is known as the Doha Round. In this context the Coalition has continued to work closely with U.S. negotiators[9] and foreign private-sector interests to bring about significant liberalizations of legal services among others.

WTO negotiations involve both requests for and offers of liberalization. In March 2003 the U.S. requested the developed-nation Members of the WTO to afford broad rights to U.S. lawyers and law firms to practice U.S. law including international law and the right to take bar examinations in and practice domestic law on the same terms and conditions that apply to a Member's own citizens.[10] The U.S. has also joined with Australia, Canada, the EC, Japan, New Zealand and Norway in a Collective Request for similar liberalization. This request seeks among other things removal of nationality requirements and consideration of "permitting foreign lawyers, subject to satisfying domestic licensing requirements, the right to provide legal services in domestic law." *See*, Collective Request, *supra* Note 7, at 3. These requests do not anticipate WTO agreement to require all its Members to comply with them. Rather, the requests seek voluntary binding agreements by individual Members that they will afford the requested access and treatment.

USTR has known for years that agreement in the Doha Round might be delayed because of difficulties of reaching

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[9] The principal U.S. negotiators work at USTR. They cooperate with the Departments of Commerce and Treasury, in consultation with other authorities including the Department of Justice.

[10] The U.S. has not made the request public, but a summary of it appears at http://www.abanet.org/cpr/gats/us_request.doc.

agreements in the agricultural sector. While nonetheless still actively seeking agreement in the Round, USTR has also negotiated and is today negotiating bilateral and regional free trade agreements.[11] USTR has sought in these negotiations the same liberalized access to foreign markets for American lawyers as set forth in its Request to WTO Members and in the Collective Request.

C. If Allowed To Stand, the Decision Below Is Likely To Adversely Affect U.S. Efforts To Obtain Further Liberalization in Trade in Services, Particularly Legal Services.

Reciprocity naturally plays a large role in trade negotiations. For examples, Australia's WTO May 26, 2005, Revised Service Offer for legal services is expressly and "in particular . . . conditional upon the degree of liberalization proposed in the same sectors in the offers of other WTO Members", and the EU's Conditional Revised Offer "is conditional on other WTO Members making substantive offers in sectors where the EU has made requests."[12]

In the legal services sector, the U.S. is constrained in what it can offer by the fact that regulation of the sector in this country is historically the province of the individual states, which USTR respects. Foreign negotiators, and their

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[11] *See, e.g.*, U.S. Hopes Central American Trade Pact Takes Effect "Very Soon", http://usinfo.state.gov/wh/Archive/2006/Jun/05-961219.html; *USTR Portman prepares Congress for OMAN Deal* (March 31, 2006), http://www.texasfairtrade.org/article.php?story=20060331093406816&mode=print.

[12] WTO Services Offers, http:www.uscsi.org/wto/. The public offers of many additional Members are available at this site.

lawyer constituencies who are generally vigilant to keep foreign lawyers away, are quick to object that something that the U.S. has requested is not available in every U.S. jurisdiction. This has been particularly true for establishment of foreign offices of U.S. law firms and the right in those establishments to practice the full range of law that American lawyers are authorized to practice in their home jurisdictions, *i.e.*, to act as "Foreign Legal Consultants" ("FLCs").

At the time of the Uruguay Round Agreements only 16 U.S. jurisdictions had rules that allowed FLCs to practice under any conditions. The inability of foreign lawyers to serve as FLCs in many U.S. jurisdictions was frequently and strongly objected to as a reason for other WTO Members not to liberalize. Ten more jurisdictions have FLC rules today,[13] but the objections continue to dog the U.S. negotiators and arise in exchanges between the Coalition and foreign legal representatives.

Recognizing the importance of USTR's efforts to liberalize trade in legal services, the American Bar Association and other associations are trying to enhance USTR's negotiating position by encouraging U.S. jurisdictions to adopt a liberal model rule for FLCs and a model rule to allow foreign lawyers to temporarily practice the law of their home jurisdictions.[14]

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[13] *See*, State Implementation of Recommendations 8 and 9- Quick Guide, L. Terry, *Summary of State Action on ABA MJP Recommendations 8 & 9*,Table 1, http://www.abanet.org/cpr/jclr_home.html

[14] *See, e.g., id* at Table 2.

State-imposed nationality requirements have not yet played a large role in USTR's negotiations, quite possibly because until the present controversies it appeared to be the law that states could not blithely discriminate against legally admitted aliens. *E.g.*, *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson*, 423 U.S. 365, 378 (1971); *cf.*, GATS 2000, Request from the EC and Its Member States, Professional Services, EC Request to the United States of America, A. LEGAL SERVICES (March 2003) (asking for removal of federally-imposed citizenship requirements to practice before the U.S. Patent and Trademark Office and changes in state FLC rules, but not mentioning any nationality requirement to practice law), http://www.gatswatch.org/requests-offers.html#outgoing. Persons active in foreign bar associations are, however, now well aware of the Fifth Circuit's rulings in the present cases. If those rulings stand, they will provide yet another argument for other nations to withhold the treaty commitments that the U.S. is seeking in the legal services sector.

That argument can gain force by the fact that many nations do not impose any nationality requirement for the practice of law.[15] That argument can also gain force by the

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[15] *See, e.g.*, J. Quinn, *The Right to Practice Law in the European Union: An American Perspective*, 2004 Macquarie Business Law Journal, at "IV US LAWYERS RIGHTS TO PRACTICE IN THE EU" (England), http://www.austlii.edu.au/journals/MqBLJ/2004/6.html; Japan Federation of Bar Associations, Japanese Attorney System, 2. Qualifications to Become Attorneys, http://www.nichibenren.or.jp/en/about/system.htm l (Japan); Council of Bars and Law Societies of Europe, Conditions for the admission of lawyers from non-EU Member States, http://www.ccbe.org/doc/En/gats_questionairre_en.pdf.

unpersuasiveness of the Fifth Circuit's asserted interest of Louisiana in denying "non-resident" aliens[16] access to the practice of law, namely, the supposed difficulty of enforcing disciplinary rules against those aliens who assume and then neglect litigation responsibilities. The Fifth Circuit cites not a single instance of disciplinary problems with foreign lawyers who have been authorized to practice their law in New York since 1974[17] or in other states including Louisiana. For its part, the Louisiana Supreme Court apparently was unconcerned with actual experience with foreign lawyers, as it rejected proposals from two of its Justices to study the issue. *See, In re Bourke,* 819 So.2d 1020, 1022 (dissenting opinion of Chief Justice Calogero), *reh'g denied,* 820 So.2d 565 (2002); *In re Rogot,* 819 So.2d 278 (La. 2002); *In re Marty, et al.,* 819 So.2d 278 (La. 2002).

The Fifth Circuit ignored too the existing rules of the Louisiana Supreme Court that authorize it to impose a variety of sanctions including disbarment and to notify other authorities of action taken. *See, e.g.*, La. Sup. Ct. Rule XIX, Rules for Lawyer Disciplinary Enforcement ("Types of Sanctions . . . .H. Notice to National Discipline Data Bank . . . .A. [Notice to Disciplinary Agencies] of every other jurisdiction in which the respondent is admitted. . . . B. Public Notice . . . ."), http://www.lasc.org/rules/supreme/RuleXIX.asp; Rule XIX

(France, Germany, Iceland, Italy, Luxembourg, and Sweden).

[16] It is a matter of some concern that in general American lawyers practicing abroad are not entitled to permanent residence there.

[17] *See*, Sydney M. Cone, III, INTERNATIONAL TRADE IN LEGAL SERVICES (Little, Brown 1996), section 3.2.1.

Appendix E, Guidelines Depicting Conduct which Might Warrant Permanent Disbarment, http://www.lasc.org/rules/supreme/RuleXIXApp.E.asp.

Disbarment is of course a very potent sanction. Any lawyer, regardless of where located, would certainly wish to avoid the disgrace involved in that, or in lesser public sanctions. Lawyers would also want to avoid notice to their home jurisdiction of discipline imposed by other jurisdictions. Among other things, such notice could lead to sanctions in the home jurisdiction.

Foreign lawyers would also not want to lose the right to represent to clients and potential clients that they are members of a bar in the U.S. and can practice Louisiana law.

The Fifth Circuit paid no heed to the deterrent strength of the risk of sanctions under existing rules. A fortiori, it did not address the possibility, which could easily be raised in trade negotiations, that Louisiana could condition the right to practice law on consent to the jurisdiction of Louisiana courts for any professional activities carried out or having effects in the state, thereby affording any complaining clients ready access to a convenient forum.

The Fifth Circuit appears to have proceeded on the basis of the assumption that many non-resident aliens would engage in litigation. While that would be theoretically possible, the experience of the Coalition and its members indicates that many and likely the great majority of foreign lawyers who gain admission to practice in a U.S. jurisdiction do not want to engage in litigation in American courts. There they would often be at a substantial disadvantage due to cultural and historical differences from the American lawyers they would oppose. Rather, the foreigners generally wish to

represent clients in business transactions that are or may be governed in whole or in part by the law of a state or by federal law. Membership in a U.S. bar is extremely important in terms of attracting and performing such work. The Fifth Circuit wholly ignored the non-litigation appeal of membership in a U.S. bar to foreign lawyers.

The unusual circumstance that Petitioners Carolyn Williams and Emily Maw wish to represent the accused in capital cases, challenging imposition of the death penalty on a pro-bono basis, is likely to add to resentment in other nations that have decided on humanitarian grounds to do without that sanction, if the ban against their admission to practice in Louisiana is upheld.

In sum, the absence of any substantive, factually-based justification for Louisiana's discrimination on the basis of nationality can only aggravate the difficulty that the U.S. faces in persuading other nations to open their markets or to keep them open to American lawyers. The decision below could even prejudice the U.S. in free trade negotiations in other sectors, negotiations that are already difficult. In addition, a lack of access to American legal services abroad for American businesses would likely adversely impact achieving longstanding U.S. goals of increasing international trade and investment.

IV. CONCLUSION.

The foregoing considerations respecting the importance of the Questions Presented favor issuance of the writ of certiorari.

Respectfully submitted,

Donald L. Morgan
Counsel of Record
642 Mapleton Avenue
Boulder, CO 80304
(303) 443-6661

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